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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 37

TEXTILE WORKERS UNION OF AMERICA, PETITIONER

v.

DARLINGTON MANUFACTURING COMPANY, ET AL.

No. 41

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DARLINGTON MANUFACTURING COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (VI R. 1894–1914) [1] is reported at 325 F. 2d 682. The findings of

[1] The printed record is in six volumes, the first four of which are paginated consecutively. "R" refers to the first four volumes, "V R" to the fifth volume, and "VI R" to the sixth volume. "Tr." and "G.C.Ex." references are to the certified copy of the original transcript and the General Counsel's exhibits, respectively, which have been filed with the Court. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

fact, conclusions of law and order of the Board (R. 1–246) are reported at 139 NLRB 241.

JURISDICTION

The decrees of the court of appeals were entered on November 19, 1963 (VI R. 1915, 1926–1927, 1933–1934). On February 13, 1964, the Chief Justice extended the Board's time for filing a petition for a writ of certiorari to and including February 28, 1964 (VI R. 1934). The petition for a writ of certiorari in No. 37 was filed on February 17, 1964; the Board's petition for a writ of certiorari in No. 41 was filed on February 28, 1964. On April 20, 1964, the Court granted both petitions for certiorari, and consolidated the cases (VI R. 1956). 377 U.S. 903. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an employer which operates a number of separate plants under common control commits an unfair labor practice, in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, by discontinuing the operation of one plant, dismissing its employees, and liquidating its assets, in order to avoid collective bargaining and in reprisal against

the employees for designating a union to represent them.[2]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, pp. 50–51, *infra*.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE UNFAIR LABOR PRACTICES

In March 1956, the Textile Workers Union of America ("the Union") began an organizing campaign among the employees in the Darlington mill

[2] The phrasing of the question assumes that the Deering Milliken complex is to be treated as a single employer with several plants for purposes of the Act. That was the finding of the Board, which the dissenting judges in the court of appeals thought amply supported by the record and which the majority of the court of appeals accepted *arguendo*. Accordingly, in our view, there is no occasion for the Court to reach the further question, presented by the petition in No. 37, whether it is an unfair labor practice for an employer owning only one plant to go completely out of business in order to avoid dealing with the union (see pp. 29, 39–43, *infra*).

The petition in No. 37 raises two further questions respecting the propriety of the Board's order: it is argued (1) that the order should have required a reopening of the Darlington plant; and (2) that Roger Milliken, the chief officer of the various corporations, should have been held personally responsible for the unfair labor practices. For the reasons set forth at pp. 44–46, 48–49, n. 44, *infra*, neither of these issues is substantial.

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in Darlington, South Carolina (R. 4; Tr. 14), which was owned by a South Carolina corporation. That corporation was found by the Board to be one of 17 corporations, operating 27 textile mills on the Eastern seaboard, all commonly controlled by the Milliken family and constituting a single employer (pp. 13–21, *infra*). At the start of the organizing campaign, Mill Treasurer Oeland promptly advised Roger Milliken of this activity by telephone (Tr. 99). Thereafter, management engaged in a systematic and extensive effort to procure the Union's rejection. On several occasions, threats were made by second hands and overseers that the mill would be closed if the employees voted for Union representation, just as the Milliken family had previously closed a plant in Maine (R. 4, 6–7, 25; 305, 308–309, 317, 319–320, 325, 326–327, 330–331, 334–335, 336–337, 338–339, 343–344, 345–346, 350, 354–355, 356–357, 361–363, 366, 370, 384). Management accompanied these threats with extensive interrogation of employees about what they thought about the Union, whether they favored the Union, whether they had signed union cards, whether they attended union meetings, how many employees attended union meetings, what percentage of the employees were expected to vote for the Union,[3] and whether the Union would win the forthcoming election (R. 4, 6, 77; 303, 305, 313, 316, 317, 334, 339, 345, 350, 354–356, 365, 376–377, 488–489, 490, Tr. 417, 1038).

[3] On May 23, 1956, the Union filed a petition with the Board for a representation election (R. 51–52).

On September 6, 1956, the Union won a Board-directed election by a narrow margin (R. 4; 250–251). Oeland and the corporation's attorney, James D. Poag, immediately telephoned Roger Milliken to advise him of the Union's selection (R. 279). On the following day, Roger Milliken decided that he would recommend to the stockholders and directors that the mill be shut down (R. 4; 1092). He testified (R. 4; 457, see also R. 422–423, 464, 472, 476–477):

> I felt that as a result of the campaign that has been conducted and the promises and statements made in those letters that had been distributed [by the Union] that if before we had had some hope, possible hope of achieving competitive [costs] by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union * * *.

On September 8, the Union asked for a bargaining conference, but was told to wait until after it was certified by the Board (J.A. 253). Meanwhile, Roger Milliken called a special meeting of the board of directors (R. 5; 279–280), which consisted of members of the Milliken family, Oeland, and two others, one of whom was a retired treasurer of the mill (R. 520–521, 1290, 1318, 1322, G.C. Exh. R. 10–R. 18, Tr. 125–126, 1351, 3640).[4] The directors' meeting was held in the

[4] Prior to the meeting, Roger Milliken had advised the members of his family who were on the board of his intention to close the plant. He did not tell Oeland or the other local directors (R. 57, 280–281, 424–426).

office of another Deering Milliken mill, Drayton Manufacturing Company (R. 280). The meeting lasted for an hour and fifteen minutes, during which the directors unanimously adopted a resolution to liquidate the mill and to call a special meeting of stockholders to approve the proposal (R. 5; 431, 1257–1261, Tr. 125–126).[5]

After the directors' meeting, Oeland gave the various supervisors "the words of Mr. Milliken and others regarding the reason for liquidation," and told them to advise their subordinates of the board of directors' recommendation (R. 491–492, Tr. 130). Accordingly, on the evening of the directors' meeting, a Darlington supervisor said to one employee (R. 5, n. 10, 6; 351–352, 490):

> Wonder how the Union people feel now? * * * Mr. Oeland called [second hand] Shirley this afternoon from Spartanburg and said they were going to close the plant down because of the Union * * * Well, I hope you all are satisfied. * * * I told you damn Union people if you all voted the Union in he would close the plant down. * * * Roger Milliken is not going to run a plant with the Union. * * * In spite of what you or the Union think about it, Roger Milliken will close the plant down * * * we would be sorry of it when people were hun-

[5] On the same day, Darlington filed objections to the conduct of the election (R. 5, n. 9; 251). On October 8, the Regional Director issued a report on objections recommending that they be overruled and that the Union be certified. No exceptions were filed to this recommendation, and the Board issued a certification to the Union on October 24, 1956. (*Ibid.*)

> gry. * * * Do you realize that none of you people will ever [get] another job in another cotton mill? You will have to have a personal recommendation from Darlington Manufacturing Company and you will not be able to get that * * *.[4]

Other supervisors gave similar explanations for the decision to shut down the mill (R. 5, n. 10; 306, 309–311, 320, 327, 344, 352–353, 357, 359, 366–367, 370, 374, 482, Tr. 328). One employee who was concerned about getting a recommendation for another job was told by the production manager that "if [she] did not go to one of the Milliken mills [she] had a good recommendation but he would have to tell them that [she] voted for a union" (R. 5 n. 10; 314). A petition in which the employees disavowed the Union was also circulated around the plant in the presence of supervisory personnel. Members of management encouraged a number of employees to sign this petition in order to keep the mill open (R. 5, n. 10, 6; 323–324, 337, 359–360, 368–369, 381–383).

On October 17, the stockholders met to consider a resolution recommending dissolution of the corporation because of "certain developments" relating to plant operations (R. 5; 1262–1265, Tr. 187). At the meeting, Roger Milliken identified the "certain developments" as "the recent election where the majority

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[4] Later, the same supervisor told that employee (R. 353): "* * * Roger Milliken knew that the Union had planned to organize the South and * * * he also knew that they were going to pick one of his mills and he has set a trap for them and they had walked in and took the very mill that Roger Milliken wanted them to take."

of the people in the plant [were] for the union" (R. 5; 292). He opened the meeting with the statement "that on September 6, when [the employees] voted for a union * * * he decided to close the mill" (R. 5; 263). A vote was taken, and the motion to liquidate was carried overwhelmingly (R. 438, 494–495).[1]

After the stockholders' meeting, Roger Milliken met privately with the mayor of the City of Darlington and a state senator, both of whom had voted their proxies against liquidation (R. 265, 494–495). He told them that Darlington would probably "get another industry" (R. 5; 266). When asked why he was closing the mill regardless of the fact that "83% of the people have signed a petition to go back to work whether they have a union or not," Milliken replied, "As long as there was 17% of these hard core labor people here, I refuse to run the mill" (R. 5; 268).

Milliken then issued a news release announcing the decision to liquidate and the sale of the plant at auction "at the earliest possible opportunity" (R. 454, 458, 1270–1271, Tr. 928).

After the board of directors' meeting, Darlington refused to accept any new orders for textiles (R. 6; 282–283). The mill filled some of its old orders and cancelled others (R. 933–934, 955–956, Tr. 2856–2862).

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[1] The only votes against liquidation were those cast by residents of the City of Darlington (R. 494–495). Roger Milliken voted in favor of liquidation all the shares he held in person or by proxy, which included the 41 percent of the shares held by Deering Milliken and Company, the 6 percent held by Roger Milliken and his immediate family, and the 18 percent held by Cotwool Manufacturing Co. (R. 1292–1300, 438, 494–495, Tr. 253).

The remainder were filled by other Milliken mills (see p. 21, *infra*). As the work ran out, the Darlington employees worked shorter and shorter hours and were eventually terminated (R. 6, 11, n. 22; 284–291).

Meanwhile, on October 24, 1956, the Union was formally certified as the employees' statutory representative (R. 5, n. 10; 251). On the following day, the Union sent a telegram to Oeland, advising him of its certification and urging a bargaining conference no later than October 30, "in order to cooperate in maintaining operations of the mill and preserving [the employees'] jobs" (R. 1244, 253, Tr. 24). Oeland advised the Union that the Board had not yet notified him of the Union's "official certification," and that the Union's telegram was being forwarded to Attorney Poag (J.A. 1246, Tr. 24). Arrangements were ultimately made for a meeting in Darlington on November 7 (R. 1248, Tr. 24, 38–39, 48).

At the November 7 meeting, the Union, assuring Attorney Poag that it "wanted to cooperate in every way possible to get the plant back in operation," asked for information regarding wage scales, vacations, holidays, and any incentive plan (R. 71; 254). It also renewed an earlier request for a list of all the employees who had been terminated, their job classification, and the date of their termination (R. 71; 255–256, 1249, Tr. 24). Poag replied that he had not prepared the latter information, and that there was no point in furnishing the wage data "since the decision had already been made to liquidate the plant and that decision was irrevocable" (R. 71; 254, 256).

He agreed to submit information concerning vacations, holidays, the incentive plan, and other fringe benefits (R. 71; 255–256).

By letter dated November 26, 1956, the Union asked Oeland to supply information concerning employees who had been employed and terminated since the election (R. 1250–1251, 257, Tr. 24). Poag replied, "Before we give you information we will have to be assured that it is for a legitimate use rather than for propaganda purposes" (R. 1252–1253, 257, Tr. 24).

In the meantime, late in September 1956, the Deering Milliken Industrial Engineering Department asked Oeland to submit the names of Darlington supervisory personnel who might be "useful" to that department (R. 690–691). Thereafter, a representative of the department interviewed each of the Darlington supervisory personnel, and Oeland supplied a list of supervisory personnel who were to be transferred to the payroll of Industrial Engineering for a three-month period after their separation from Darlington (R. 690–693, 910–912, 1173–1175, 1783, 1792, G.C. Exh. F7, Tr. 3158, 3173, 3173). One purpose of this arrangement was to allow a period of time within which they could be "picked up" by other Deering Milliken mills (R. 1789, 691, 1093-1094).[8] Efforts were also made to preserve the

[8] The Deering Milliken mills recruited supervisory trainees on the assurance that "cross transfers" would be made from mill to mill (pp. 16–17, *infra*). Thus, before the election one overseer remarked that he would not have to worry if the mill closed down because of an election victory by the Union, for "before he took that job they promised him if the mill closed they would place him in another Milliken plant" (R. 334).

transferred supervisors' rights under the Deering Milliken Mills Retirement Plan (G.C. Exh. F7, F8, F9, Tr. 1913, 1918, 1919). A number of the supervisors on Oeland's list were eventually transferred to other parts of the Deering Milliken organization (R. 495–496, Tr. 1087, 1089).[9] Retired treasurer Nicholson, who was receiving a lifetime pension from Darlington, received a guarantee of an equivalent pension from another Deering Milliken mill where he had previously worked; this was arranged by Roger Milliken largely because of Nicholson's "long personal relationship" with the Milliken family (R. 165; 388, 1100–1102).[10]

On October 17, 1956, the Darlington board of directors authorized a partial liquidating dividend to the stockholders amounting to one and a half million dollars—about 40 percent of the mill's assets (G.C. Exh. 15F, Tr. 187, 901–904, 1129). Deering Milliken and Company received about $615,000 in dividends, Cotwool received about $275,000, and Roger Milliken and his immediate family received about $90,000 (R. 293, 437–438).

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[9] These supervisors were transferred directly from Darlington to the other Deering Milliken mills without any interval on the payroll of the Deering Milliken Industrial Engineering Department (Tr. 1916).

[10] A portion of the premiums which the salaried employees (including nonsupervisory personnel) at the Darlington plant had paid for a group insurance policy, which was in effect for all the Milliken mills, was retained by the insurance company as part of the "experience fund" of the other mills (R. 448–449, 673).

On November 14, 1956, Roger Milliken forwarded to the treasurers of a number of Deering Milliken mills, and to certain employees and officials of the Deering Milliken Service Corporation, a news item describing the permanent shutdown of a Massachusetts bedspread factory because, "since signing a labor contract last February, the union had kept the mill in a state of turmoil and reduced efficiency and production to the point that the owners were convinced the Mill had no future and investment of further funds [was] not justified" (R. 1677, 969, V R. 176–177). Also enclosed was a magazine article which, according to Milliken, showed that "this magazine made a real investigation in Darlington" (R. 25; 969, V R. 176–182). Milliken stated, "The unions are going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do" (R. 25; 969, V R. 177). Milliken urged a careful reading of the second part of the article, which stated, *inter alia* (R. 25; 969, V R. 176–177, 182):

> If the people of Darlington knew anything of the Deering Milliken record, they would know that that management * * * has [not] intended to share the prerogatives of management with labor union leaders. This has been the case through three generations of Milliken operations. When the Madison Woolen Mills of Madison, Maine, became not only unprofitable but unionized Mr. Gerrish Milliken liquidated

> it * * *. When the Dallas Manufacturing Company of Huntsville, Alabama, became unionized, the Millikens liquidated it, contrary to the opinion of many local people that such would not be the case. We ourselves are small shareholders in Darlington and from experience and acquaintanceship, we knew the minute the union election vote was announced that we would receive a call for a special meeting to vote for liquidation. * * *

The operations of the Darlington plant ceased completely on November 24, 1956, and, on December 12 and 13, 1956, the plant equipment was sold piecemeal at auction (R. 6; 258).

2. THE INTERRELATION BETWEEN DARLINGTON AND THE OTHER DEERING MILLIKEN PLANTS

The Darlington mill, as mentioned above, was owned and operated by a South Carolina corporation as one of 17 corporations, operating 27 textile mills on the Eastern seaboard, all commonly controlled by the Milliken family.[11] The Milliken family owned a majority of the stock in Deering Milliken and Company and in Cotwool Manufacturing Company (one of the 17 corporations),[12] and, through direct stock owner-

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[11] In addition to Darlington, three other mills in the Milliken complex also manufactured cotton print cloths (R. 24; 514–520, 522, 933, 935–936, 938–939, 941, 943–955).

[12] In 1960, after the commission of the unfair labor practices found by the Board, Deering Milliken and Company and Cotwool merged and formed Deering Milliken, Inc. In the process, several of Cotwool's former subsidiaries were absorbed into Deering Milliken, Inc. (R. 1322, 1872–1873).

ship and the stock held by these two companies, the family owned more than 66 percent of Darlington's stock (R. 23–24, 213; 236–237, 1292–1300, 1308–1311.[13] Deering Milliken and Company acted as exclusive sales agent and factor for all 27 textile mills (R. 110–111).[14] Roger Milliken was president of Deering Milliken and Company, and of most of the mill corporations, including Darlington (R. 24; 1322). A majority of the directors of all but one of these corporations were members of the Milliken family (R. 24; 520–521, 1322, 1351).

The head of the Tax Department of Deering Milliken and Company was an officer of each of the 17 mill corporations. His department prepared all federal and state tax returns of the manufacturing corporations and suggested tax-saving techniques on such matters as accounting procedures, vacation plans, and incentive compensation contracts for supervisors. The Tax Department also advised the various manufacturing corporations about the proper drafting of minutes of directors' and stockholders' meetings (R.

[13] Darlington's 150,000 shares of common stock were owned as follows (R. 1310):

	Percent
Deering Milliken & Co., Inc.	41.4
Cotwool Manufacturing Corporation	18.3
Roger Milliken and members of his immediate family	6.4
Directors and employees of Deering, Milliken & Co., Inc.	2.9
"Outside" stockholders	31.0

[14] Each mill corporation was charged a fee for services rendered, which was substantially less than what independent selling and factoring agents would have charged. Deering Milliken and Company had no other non-Milliken affiliated mills as clients (R. 1239c–1239d, Tr. 1384).

25–26, 160–161; 525, 569, 630–639, 642–643, 645–651, 1139, 1322, 1379–1401, 1404–1408, G.C. Ex. D1, D2, D3, D8; Tr. 1735–1741, 1743–1745, 1749–1758, 1766–1777, 1797–1800, 3326).

The Insurance Department of Deering Milliken and Company handled all insurance for the various plants. The corporations purchased standard forms of insurance on which individual policies were issued through the Insurance Department. Fire insurance and workmen's compensation insurance were covered under a single policy for all the plants. Deering Milliken and Company also paid premiums on an executive air insurance policy covering Deering Milliken executives, key personnel of the various manufacturing corporations, and executives of the service and research corporations described below (R. 26; 656–664, 674–678, 680–681, 1426–1427).

The Deering Milliken Service Corporation ("DMSC"), a wholly-owned subsidiary of the 17 manufacturing corporations, was organized in 1951 for the stated purpose of providing "essential services to organizations in the textile industry at the lowest possible cost" (G.C. Ex. F1, Tr. 1885). These services were restricted, almost exclusively, to the manufacturing corporations in the Deering Milliken complex. Various departments of DMSC purchased all machinery, equipment, and cotton for the manufacturing plants. Research was conducted in product improvement, and studies were regularly made in connection with production problems common to most of the plants. Based on its findings, DMSC made recommendations to the various manufacturing corpora-

tions designed to obtain maximum efficiency from raw materials, equipment, and personnel (R. 26, 143, 148, 158–159; 284, 697, 699, 702–707, 709–714, 730–740, 753, 756, 757, 771–777, 780–781, 784, 792–796, 798–799, 809–815, 857–858, 1044–1046, 1062–1064, 1162–1164, 1338, 1445–1446, 1452–1467, 1473–1476, 1479–1482, 1484–1500, 1506, 1508, 1516–1520, 1522–1526, 1532–1558, 1606, 1725–1727).[15]

The Placement Department of DMSC conducted an annual recruitment program among college students, seeking to attract supervisory and technical trainees for each of the manufacturing corporations. The prospective management and technical trainees were encouraged to look upon all the corporations as a single unit. After hiring, there was considerable movement of supervisory personnel among the corporations. Approximately one-half the supervisors who worked at Darlington between 1951 and 1956 were hired from other Deering Milliken corporations, including Darlington's Treasurer and chief operating executive, James M. Oeland (R. 26, 131, 140–142, 145–146, 156; 544–545, 683, 692–693, 699, 701, 721, 830, 868–872, 875, 878–887, 890, 892–910, 917, 920–923, 925, 1073, 1096–1100, 1109–1113, 1144, 1150, 1158, 1161, 1164–1165, 1190–1191, 1201–1203, 1326–1341, 1431–1436, 1493, 1441–1444, 1609–1614, 1617–1620, 1622–1623, 1625–1645, 1651–1666, 1669, 1674–1676,

[15] See also G.C. Exh. G3, G7, G18, H1, H4, I1, J17, L19, L21, O16, Tr. 1361, 1984, 1987, 1991, 1994–1995, 2005–2008, J18, 2062–2063, 2106, 2116, 2117, 2120, 2122, 2127, 2130, 2131, 2134, 2135, 2139, 2142, 2162, 2192, 2199-2200, 2202, 2210–2211, 2214, 2217–2220, 2401, 2402, 2403, 3053, 3409–3410.

1735, 1761, 1835, 1838, 1860).[16] All salaried personnel (other than those working for Deering Milliken and Company) were covered by the same retirement plan, and their coverage was unaffected by transfers among the corporations (R. 131; 1096–1100, G.C. Ex. O17, Tr. 3371).

The Deering Milliken Research Corporation ("DMRC") was a wholly-owned subsidiary of the 17 manufacturing corporations and of Deering Milliken and Company. It supplemented the services provided by DMSC by conducting surveys and inspections in the plants for the purpose of developing a uniform preventive maintenance program, setting goals for production processes, and standardizing machinery and parts (R. 119; 406–409, 454–457, 633–637, 771–773, 776–777, 834–837, 839–841, 843–856, 858–859, 1452–1454, 1571–1574, 1580–1596, 1598–1605, 1607–1608).[17]

The products of the entire Deering Milliken organization are advertised under the single brand name "Milliken" (R. 126; 1231–1232). Repeated references are also made in the corporations' papers to "our organization," "Deering-Milliken Mills," "Deering Milliken Group," and "The Company" (R. 27; 1323–

[16] See also G.C. Ex. B13, F8, F9, F11, F15, F19, L23, M13, M29, O17, Tr. 1361, 1900, 1903, 1905, 1918, 1919, 1924, 1926–1927, 1948, 2459, 2555, 2592–2596, 2598, 2607, 2616, 2621, 2626, 2650, 2651, 2669, 2673, 2681, 2685, 2693, 2702, 2750, 3068, 3342, 3350, 3359.

[17] See also G.C. Ex. B13, D1, D2, L11, I1, Tr. 745–748, 1361, 2491, 2498, 2517, 2523, 2525, 2532, 2537.

1324, 1479–1482, 1636, 1645, 1651–1655, 1674, 1675, 1726–1727). In 1952 Deering Milliken and Company issued a brochure entitled "Fabric Magic by Milliken," which contained phrases such as the "Milliken Mills," the "Milliken Operations," "Mills with Milliken," and statements such as "you made the mills grow like this—1865 one mill; now 29 mills" (R. 27; 1326–1341).

Roger Milliken exercised actual control over the operations of all the corporations.[18] He approved all capital expenditures, taking into account the prospective return to the enterprise as a whole (R. 559–561, 741–744, 839, 990–994, 1053–1054, 1066–1067, 1083–1085, 1355, 1447–1448, 1501, 1687, G.C. Ex. C11, G17, L2, N12, N48, N66, Tr. 1363–1364, 2155, 2477–2478). He took an active interest in minimizing taxes for all the corporations (R. 524–525, 529, 1054–1057, 1313–1314, 1685, 1742–1743, Tr. 2965–2968). He issued numerous memoranda, usually addressed to all the corporations rather than to any one of them, in which he proposed methods to attain uniformity of production and testing (R. 1700–1701, 1715, 1717–1720, 1732–1733, 1005, 1024, 1031, 1032, Tr. 3064), programs for improving production (R. 1702, 1703, 1008, Tr. 3004), and the adoption of technical and related changes (R. 989–990, 1038, 1040, 1046, 1061–

[18] In those corporations where he did not serve as president, Roger Milliken was vice-president (R. 1322).

1062, 1686, 1704, 1722, 1723, 1728, 1729, 1754, 1756, G.C. Ex. N41, Tr. 3007, 3060, 3067, 3096, 3101)."[19]

Roger Milliken also exercised ultimate control over the labor relations of all the corporations. He received reports every four weeks from each mill showing, *inter alia*, the number of hours operated each week; man-hour savings achieved; planned or effected abolition of jobs or changes in job assignments; installation of new piece rates; employee performance and morale; loom efficiencies; instructions to employees regarding work techniques; special compensation to employees whose machines had broken down; safety programs; number of hirings, promotions, and resignations; and changes in such working conditions as lighting, ventilation and humidity (R. 24; 1694–1699, 1797–1811, 1824–1859, 1003–1004, 1033–1034, 1069–1070, 1106–1107, 1153–1161, Tr. 3353). He obtained additional details concerning these matters by correspondence and by visiting the various establishments in the organization (R. 24, 145; 401–409, 454–456, 711, 873–876, 905–906, 1004–1005, 1050–1052, 1063,

[19] Roger Milliken's memoranda were replete with references to "our mills" or "our organization." See, *e.g.*, R. 1679–1680, Tr. 2984 ("our group"); R. 1768–1769, 1079–1081 ("our organization"); R. 1672–1673, Tr. 2701–2702 ("all our mills"); R. 1735, 1047–1048 ("our manufacturing operations"); R. 1718, 1031 ("Deering Milliken group"); R. 1730–1731 ("our machinery," "our mills"); R. 1748–1753, 1061 ("our mills"); R. 1757, Tr. 3104 ("our vacation plans"); R. 1741, 1052–1053, 1142–1143 ("our mills," "our policy"); R. 1687, 990–994; C.G. Ex. N12 ("we," "whole organization"); R. 1709–1710, 1012 ("each of the mills in the organization"); R. 1732–1733, Tr. 3064 ("the whole organization"); R. 1072, Tr. 3002 ("we," "all the mills in Deering Milliken").

1463–1464, 1615–1616, 1648–1650, 1671–1673, 1740, 1759, 1760, 1768–1769, G.C. Ex. M32, Tr. 960–962, 2696).

Roger Milliken took active steps to obtain, retain, and promote qualified technical and managerial personnel in the Deering Milliken organization (R. 873–876, 1639, 1652, 1681, 1761–1769, 1789, 1079–1081, 1093–1094, 883, 890, 1615–1616, Tr. 2954, 2958–2960). He directed the mills to limit the number of spare hands—*i.e.*, employees whose sole assignment is to act as substitutes for absent workers (R. 1086–1089, 1773–1774). His approval was sought before vacation plans were announced, before changes in the employees' group insurance programs were formulated, and before spare hands were hired (R. 1409, 1772, Tr. 1837, 3132, 3133). He also sparked a number of production drives among all the Deering Milliken mills (R. 1463–1464, 1702–1703, 1709–1710, 1715, 1717–1720, 401–409, 454–456, 711, 1008, 1012, 1022, 1031, 1032, Tr. 960–962, 3004). He made detailed proposals and recommendations to his subordinates about such matters as the employment of quality control and engineering personnel; reduction of accidents; tagging machinery with its cost to discourage misuse; use of closed-circuit television to eliminate certain jobs; machinery rearrangement to reduce the operator's walking distances; arrangements for limiting time which employees spent smoking; and installation of beverage dispensing machines for employee use (R. 24; 1026, 1047–1048, 1073–1074, 1716–1718, 1730–1731, 1735, 1748, 1761, Tr. 3063).

Finally, Roger Milliken determined the corporations' policy toward unionization by closing the Dar-

lington plant because of the Union's success in the election (pp. 5–9, *supra*). After the Darlington Mill was closed, several of Darlington's unfilled contracts were assumed by other Milliken mills; in some cases those mills increased their sales to Darlington's former customers, independently of the old contracts (R. 928, 933–967).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that Darlington violated Section 8(a)(1) of the Act by the threats, interrogation, and support of the anti-union petition; that the plant was shut down in order to discourage the employees' union activity and in order to avoid bargaining with the Union; and that Darlington violated Section 8(a)(5) by refusing to bargain with respect to the tenure of employment of the employees in the Darlington mill, and by refusing to furnish the Union with wage and related bargaining data (R. 6–9, 19). The Board (with Member Rodgers dissenting) further found that the shutdown, since it was motivated by anti-union considerations, constituted a violation by Darlington of Sections 8(a)(3), (1) and (5) (R. 918). Finally, the Board (with Members Leedom and Rodgers dissenting) found that there was a sufficient degree of common ownership and common control over labor relations and operations to render Darlington, Deering Milliken, and Deering Milliken's affiliated corporations a single employer under the Act. Hence the Board held that all the violations committed by Darlington

were also attributable to Deering Milliken (R. 18, 23, 27).[20]

The Board's order, *inter alia*, requires Deering Milliken[21] and Darlington to cease and desist from the unfair labor practices found; and, if operations are resumed in Darlington, South Carolina, to bargain with the Union as the employees' exclusive representative (R. 30–31). Deering Milliken and Darlington are further required to make whole all the employees who were on the payroll on October 13, 1956 (the date on which the stockholders voted to liquidate the plant), for any loss of pay they may have suffered as a result of the discrimination against them. If the Darlington plant does not reopen, the backpay period is to terminate when the employees are able to obtain substantially equivalent employment, or when they are placed on a preferential hiring list at other Deering Milliken mills (R. 21–23, 27–28). Deering Milliken is also required to offer employment or placement on a preferential hiring list to the Darlington employees at other Deering Milliken mills in South Carolina or adjacent States; to pay the travel and moving expenses of the employees who accept the offer; and to bargain collectively with the Union for the purpose of reaching an agreement as to the mode of operation of the preferential hiring

[20] The Board dismissed the complaint insofar as it sought to hold Roger Milliken responsible in his individual capacity for the unfair labor practices (R. 29–30).

[21] Since Deering Milliken and Company subsequently merged with Cotwool to form Deering Milliken, Inc. (n. 12, p. 13, *supra*), the Board's order runs against both Deering Milliken and Company and Deering Milliken, Inc. (R. 27, n. 48).

lists and as to the terms and conditions under which the former employees of the Darlington mill may, if they desire, obtain such employment (R. 27–29, 32–33). In addition, Darlington and Deering Milliken are required to mail and publish appropriate notices directed to the Darlington employees (R. 32–33, 42).[22]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, sitting *en banc*, denied enforcement of the Board's order by a 3–2 vote. The court accepted *arguendo*, for purposes of its decision, the Board's finding that the Darlington plant was shut down in order to discourage union membership and to avoid bargaining, and also its finding that Deering Milliken and Darlington, together with related corporations, constituted a single employer (VI R. 1898–1896, 1901–1902). The court concluded, however, that the decision to close the plant was not an unfair labor practice, reasoning that an employer has the "absolute prerogative" to "go out of business in toto, or to discontinue it in part, permanently at any time," even if this action is "spurred by unionization" (VI R. 1899). The court also refused to enforce those parts of the Board's order based on its findings that Deering Milliken and Darlington violated Section 8(a) (1) and (5) of the Act prior to the shutdown, on the ground that "remedies for these offenses are not now available as Darlington is no longer alive" (VI R. 1902). The two dissenting judges (Judge

[22] In its order, the Board reserved the right to modify the back pay and reinstatement provisions if necessitated by circumstances not then apparent (R. 33).

Bell and Chief Judge Sobeloff) would have enforced the Board's order (VI R. 1902–1914).

SUMMARY OF ARGUMENT

I

On the findings made by the Board, and accepted *arguendo* by the court of appeals, the question here is simply whether an employer, whose business embraces a number of plants, commits an unfair labor practice if he liquidates one plant in order to frustrate union organization and collective bargaining in that plant. Such action conveys to the remaining employees in the other plants the threat that, if any of them dares to organize for collective bargaining, the plant in which they work may also be liquidated and they too will lose their employment. This is a plain and harsh form of restraint and coercion condemned by Section 8(a)(1) of the Act—far more devastating to organizational activity than the mere "suggestion of a fist inside the velvet glove" condemned in *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, 409. The shutdown of the Darlington mill also violated Section 8(a)(3) of the Act. For such action penalized the employees of that mill merely because they had engaged in activity protected by Section 7, and discriminated between them and the employees at the other mills who had not chosen a bargaining representative. Moreover, the discrimination would inevitably discourage the employees in other Deering Milliken mills from becoming union members and from engaging in union activities.

These conclusions are not inconsistent with the privilege of a business concern to liquidate part of its operations for normal business reasons. Here, as so often in the law, the question is one of motive. See *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 227. Many similar business decisions have been found to be unlawful when, as here, they were motivated by anti-union considerations. See *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261 (C.A. 8); *National Labor Relations Board* v. *Savoy Laundry, Inc.*, 327 F. 2d 370 (C.A. 2).

II

Where, as here, an employer closes one of several units of his business for anti-union reasons, the Board has ample power to frame a fair and effective remedy for the unfair labor practices. The Board directed Deering Milliken to rehire the Darlington employees at its other mills, or, where enough jobs were not available, to put them on a preferential list for hiring at those mills. This remedy—which is analogous to the remedies granted in similar situations—constituted a reasonable accommodation of the conflicting interests involved for it tended to restore the *status quo* and to cancel some of the advantage the employer sought to derive from the unfair labor practices, while, at the same time, it avoided the hardship which would have resulted from a requirement that the Darlington mill be reopened long after its liquidation.

The provision of the order requiring Deering Milliken to bargain with the Union about implementa-

tion of the preferential hiring and relocation system was also manifestly appropriate, since the Union had proven its majority status in the Board election and any loss of such status was attributable to the employer's unfair labor practices. And the requirement that the Darlington employees be reimbursed for any wages lost due to the unlawful closing of the Darlington plant is specifically authorized by Section 10(c) of the Act, and consistent with the usual practice in discriminatory discharge cases. Moreover, a full back pay requirement balances whatever deficiency exists as a result of the Board's determination that only limited reinstatement could be ordered. While the total sum involved may be large, this merely reflects the scale on which injury was inflicted on the employees.

ARGUMENT

Introductory.—The issue raised in this case is focused by two findings of the National Labor Relations Board. The Board found: (1) that the Deering Milliken complex was, in effect, a single employer which operated the Darlington mill as one of 27 textile mills (R. 18, 23, 27); and (2) that the Darlington mill was closed for the purpose of avoiding collective bargaining at that mill and "in retaliation for the employees' selection of the Union as their bargaining representative" (R. 16; see, also, R. 8–9). The court of appeals accepted those findings *arguendo*. The strength of

their foundation in the record is indicated by our Statement, *supra*, pp. 3–21."

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[11] The dissenting judges considered whether the finding respecting the Deering-Milliken complex was supported by substantial evidence and concluded that "there was an abundance of evidence to support the Board's position that Darlington, Deering Milliken and its affiliates constituted a single employer for purposes of the Act" (VI R. 1903). This finding is supported by the interlocking stock ownership and control among the corporations; the high degree of integration of operations, culminating in the common trade name—"Milliken"—under which all the Deering Milliken products are sold; the pooling of essential services performed for all the corporations in the Deering Milliken organization; the dominion and control exercised by Roger Milliken over all phases of the business and labor relations of each of the corporations; and the common policy of all the corporations toward unionization of their employees. See *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, 227, n. 2; *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 403–404; *National Labor Relations Board* v. *Royal Oak Tool & Machine Co.*, 320 F. 2d 77, 80–81 (C.A. 6); *National Labor Relations Board* v. *A. K. Allen Co.*, 252 F. 2d 37, 38–40 (C.A. 2); *National Labor Relations Board* v. *Gibraltar Industries, Inc.*, 307 F. 2d 428, 431 (C.A. 4), certiorari denied, 372 U.S. 911. The fact that labor conditions were not uniform in all the plants or that local plant managers exercised substantial control over their own operations does not warrant a contrary finding. The locations of the various plants were widely scattered, and no collective bargaining agreement covered any of the employees. Hence it is understandable that a single management would provide conditions of employment suited to the labor markets in which each of its plants was located. And, because of the geographic distribution of plants, it was necessary to entrust the day-to-day operation of each to local managers who were to make decisions pursuant to the guiding policies laid down by the central management. See *Sakrete of Northern Cali-*

The finding that the "decision to shut the plant 'would not have been made but for the protected organizational activities' of the employees" (R. 8) eliminates any question concerning the right of an employer to go out of business, close a plant, or curtail operations because he finds them unprofitable or because of any other *bona fide* business reason. We fully recognize the businessman's privilege to make and put into effect business decisions, including a decision to close a plant, for normal economic motives.[24] The Darlington mill was closed (the Board found) not for normal economic motives, but out of hostility toward the union which had just been selected as the exclusive representative by a majority of the mill's employees.

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fornia v. *National Labor Relations Board*, 332 F. 2d 902, 904–908 (C.A. 9).

Similarly, the dissenting judges concluded that there was "abundant evidence" to support the Board's finding that the Darlington plant had been shut down for anti-union considerations (VI R. 1909). Thus, Roger Milliken himself told the stockholders that he had decided to close down because the employees had selected the Union, and this view was reiterated by supervisory personnel; Milliken himself circulated to all of his mills a magazine article pointing out that his anti-union attitude was so well known that liquidation was inevitable from the minute the election result was announced; and the economic factors belatedly stressed by Darlington were negated by the prior history of the mill (see R. 7–9, 53–66).

[24] Since the closing here was found not motivated by economic considerations, there is no need to consider how far there is a duty to bargain concerning a projected curtailment of operations or the abandonment of a business for economic reasons. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, No. 14, this Term. In any event, the duty to negotiate with the union is not a duty to agree.

The finding (made by the Board and accepted *arguendo* by the court below) that the Deering Milliken complex was a single employer pretermits any question concerning the application of the Act to an employer who goes out of business permanently and completely because of hostility toward collective bargaining. Under the Board's finding this employer remained in business at other mills, with other employees. Its closing one mill as retaliation against the employees who selected a union representative for the purposes of collective bargaining was a dramatic warning to the employees at the other mills of the disastrous consequences of unionization.

Thus, the question here is simply whether an employer, whose business embraces a number of separate units, commits an unfair labor practice if he liquidates one unit in order to frustrate union organization and collective bargaining in that unit, with the consequent threat to employees in the remaining units that they will suffer similar reprisals if they should attempt to bargain collectively. In Point I we show that such a a closing, motivated by hostility towards unionization and collective bargaining, violates Sections 8(a) (1) and (3). That was the only question decided by the court below, but, since the extent of the Board's power to grant an effective remedy might be thought to be related to the substantive issue of whether the closing of one unit is an unfair labor practice, we show in Point II that the Board has the power to order the employer either to hire the employees who lost their jobs as a result of the closing or else to place them upon a preferential list for hiring at the other plants,

to bargain with the union about these matters, and to pay the employees back pay from the date of the discharge.

I. IT IS AN UNFAIR LABOR PRACTICE FOR AN EMPLOYER TO LIQUIDATE ONE OF SEVERAL UNITS OF HIS BUSINESS IN RETALIATION AGAINST THE EMPLOYEES IN THAT UNIT FOR SELECTING A REPRESENTATIVE FOR THE PURPOSE OF COLLECTIVE BARGAINING

For an employer to close one of several plants and dismiss its employees because they have voted to bargain collectively through a labor union violates Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. Section 8(a)(1) makes it an unfair labor practice for an employer—

> to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7

Among the Section 7 rights are the rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing."

It is difficult to think of any plainer—or harsher—form of coercion and restraint than closing down and dismissing all the employees in a unit because it has ventured to select a labor organization as its bargaining representative. The denial of the opportunity to bargain is not, in such a case, a mere collateral consequence of a business decision. It is a deliberate refusal to obey the statutory obligation. It is reprisal against the employees who chose to exercise a statutory right. It conveys to the remaining employees in the other plants the threat that, if any of them dares to organize for collective bargaining, the

plant in which they work may also be liquidated and they too will lose their employment. Roger Milliken, the directing force in the Deering Milliken complex, was not unaware of the threat or unwilling to take advantage of it. Six weeks after closing Darlington he circulated among the mill executives a magazine article based, he said, upon "a real investigation in Darlington," which pointed out that Darlington was the third mill to be closed by the Millikens immediately upon unionization (see *supra*, pp. 12–13). Word of this well-advertised policy was bound to spread—and indeed Roger Milliken urged that it be disseminated—through the communities where Milliken mills were located.

Nothing is plainer than that the threat to close an entire plant if the employees vote to unionize—throwing its entire payroll out of employment—is, in fact, a potent means of interfering with and restraining union organization. The evidence in this very case demonstrates the high degree of coercion, for after the decision to close the Darlington plant was announced 83 percent of the employees signed a petition manifesting their readiness to abandon the Union if the plant would remain open and their work were restored (R. 5; 268). And the many decisions which have held that Section 8(a) (1) is violated by an employer's threat, made during a representation election, to close down the plant if the employees vote for a union[25]

[25] *E.g.*, *National Labor Relations Board* v. *Kingsford*, 313 F. 2d 826, 832 (C.A. 6); *National Labor Relations Board* v. *Morris Fishman & Sons, Inc.*, 278 F. 2d 792, 796 (C.A. 3); *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 904–905 (C.A. 9).

support the view that any public expression of intent to retaliate against employees' unionization, by terminating the operation in which the employees are engaged constitutes illegal coercion and restraint.

The present case involves conduct far more destructive of the rights protected by Section 7 than the mere threat to close a plant because of employee organization. When, as here, the plant is actually shut down for the purpose of demonstrating to employees the catastrophic effects of a decision to bargain collectively, the interference with, and discouragement of, union membership and activity are far more effective than anything resulting from a threat alone. For the employer thereby expresses the threat, and simultaneously demonstrates that the threat is not idle words. His remaining employees see graphic proof of what lies in store for them if they too dare to vote to unionize.

The shutdown in the present case carried into execution the threats which plant supervisors had made to respondents' employees before the election (p. 4, *supra*).[26] And, shortly, after the decision to shut down was made public, Roger Milliken circulated to other Deering Milliken mill officials the reprint mentioned above (pp. 12–13, 31, *supra*).[9] But even without the explicit threats to cease operations, both before and after the shutdown, the threat implicit in respondents' conduct, in light of the purpose for which they acted, constituted interference and restraint barred

[26] The Board found that the threats themselves constituted independent violations of Section 8(a)(1) (p. 21, *supra*).

by Section 8(a)(1). For if, as this Court recently held in *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, an employer's conferral of benefits which is timed so as to influence his employees' choice of a representative is unlawful because it carries "the suggestion of a fist inside the velvet glove" which the employees are "not likely to miss" (375 U.S. at 409), then *a fortiori* the Act is violated when the fist is bared by direct reprisals.

Respondents' conduct also violated Section 8(a)(3), which makes it an unfair labor practice for an employer—

> by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization * * *.

To liquidate the Darlington mill and discharge all its employees because a majority had voted to select a labor organization as their representative for collective bargaining, penalized those employees because they had engaged in activity protected by Section 7, and discriminated between them and the employees at the other mills who had not chosen a bargaining representative. The discrimination would inevitably discourage the employees in other Deering Milliken mills from becoming union members or engaging in union activities. The discrimination, albeit on a larger scale, is the same as occurs when individual employees are discharged because of union activity.[21] It

[21] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U.S. 49.

is the same in principle, although it may differ slightly in its impact upon the employer, as the discrimination which occurs when a plant is temporarily closed so as to discharge all its employees and replace them with non-union labor;[28] or an operation is shut down preparatory to transferring its functions to a non-union division of the same company[29] or to subcontracting the work to an independent employer.[30]

The conclusion that liquidating one of a chain of mills in reprisal against its employees' selection of a representative for collective bargaining violates Sections 8(a) (1) and (3) is in nowise inconsistent with

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[28] *National Labor Relations Board* v. *Tak Trak, Inc.*, 293 F. 2d 270 (C.A. 9), certiorari denied, 368 U.S. 938; *National Labor Relations Board* v. *Stremel*, 141 F. 2d 317 (C.A. 10); *National Labor Relations Board* v. *E. C. Brown Co.*, 184 F. 2d 829 (C.A. 2); *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C.A. 7), certiorari denied, 320 U.S. 789; *National Labor Relations Board* v. *United States Air Conditioning Corporation*, 302 F. 2d 280 (C.A. 1).

[29] *National Labor Relations Board* v. *Lexington Electric Products Co.*, 283 F. 2d 54 (C.A. 3), certiorari denied *sub nom. Local 3, International Brotherhood of Electrical Workers, AFL–CIO* v. *National Labor Relations Board*, 365 U.S. 845; *A. M. Andrews Company of Oregon* v. *National Labor Relation Board*, 236 F. 2d 44 (C.A. 9); *National Labor Relations Board* v. *Winchester Electronics*, 295 F. 2d 288 (C.A. 2); *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 482–483 (C.A. 3).

[30] *National Labor Relations Board* v. *Brown-Dunkin Company*, 287 F. 2d 17 (C.A. 10); *National Labor Relations Board* v. *Keily & Picerne, Inc.*, 298 F. 2d 895 (C.A. 1); *National Labor Relations Board* v. *Hugh Major*, 296 F. 2d 466 (C.A. 7); *National Labor Relations Board* v. *Preston Feed Corp.*, 309 F. 2d 346 (C.A. 4); *Town & Country Manufacturing Company* v. *National Labor Relations Board*, 316 F. 2d 846 (C.A. 5).

the privilege of a business concern to liquidate part of its operations either for normal business reasons or out of sheer caprice. Here, as so often in the law, the question is one of motive. As the Court recently observed in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 227–228, "When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. * * * Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights."

The discharge of a prominent union organizer will be lawful if undertaken because of his misconduct or the lack of available work, but unlawful if the motive is to deter union organization.[31] A wage increase will be lawful even if it forestalls unionization if granted for normal business reasons, but it will be unfair if awarded for the purposes of defeating unionization.[32] A plant may be closed temporarily for lack of orders, but the employees may not be locked out in reprisal

[31] *E.g.*, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1.

[32] *E.g.*, *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405; *Hudson Hosiery Co.*, 72 NLRB 1434.

for their union activity."[33] The cases cited by the court of appeals (VI p. 1900–1901) to support its conclusion that a company has an "absolute prerogative" to shut down a single plant chiefly involved discontinuances based upon legitimate business considerations. All but one have no bearing upon the situation where the employer's motive is to exact reprisals for unionization, and the one merely contains dictum which was later qualified.[34]

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[33] *E.g.*, *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681 (C.A. 1); *National Labor Relations Board* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (C.A. 2), certiorari denied, *sub nom. Modern Mfg. Co.* v. *National Labor Relations Board*, 344 U.S. 816; *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. 2d 700 (C.A. 7); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652 (C.A. 9).

[34] In *Southport Petroleum Co.* v. *National Labor Relations* Board, 315 U.S. 100, 106 and *National Labor Relations Board* v. *Tupelo Garment Co.*, 122 F. 2d 603 (C.A. 5), the question was whether the concern named in a Board order had *in fact* been discontinued; there was no question whether a discontinuance motivated by hostility to unionization was an unfair labor practice. *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 214 (C.A. 5) contains only a dictum that, if the employer *bona fide* discontinued the business, an order of reinstatement would cease to bind it.

In *National Labor Relations Board* v. *R. C. Mahon Co.*, 269 F. 2d 44, the Sixth Circuit held that the Board's finding that the plant protection department was discontinued because of hostility to union activities was not supported by substantial evidence and accepted the trial examiner's finding that the change was made for financial reasons. That was also the only ground for reversal in *National Labor Relations Board* v. *New England Web, Inc.*, 309 F. 2d 696 (C.A. 1), and *Jays Foods, Inc.* v. *National Labor Relations Board*, 292 F. 2d 317 (C.A. 7).

Atlas Underwear Co. v. *National Labor Relations Board*, 116 F. 2d 1020, 1023 (C.A. 6) is apparently cited for the statement that, "While a bona fide shut down of a plant does not of itself

Nor can it be successfully argued that the decision to close a mill is too important a part of the management of a business to allow its legality to turn upon the Board's finding concerning the employer's motivation. While the decision is undoubtedly important to the employer, the magnitude of the coercion against the employees is equally great. No one can entertain serious doubt about the disastrous impact upon union organization and collective bargaining of allowing an employer to close one of a chain of textile mills in order to teach his employees the dangers of union organization. To argue that such deliberately coercive activities must be permitted because they are "important" is, in effect, to assert that the Act reaches the trivial forms of reprisal but not the overwhelming.

The principles discussed above have long been applied to other reprisals involving serious business consequences. It has been held an unfair labor practice to move a plant in order to avoid collective bargain-

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constitute a violation of the Act, undoubtedly a threat or prediction that it might have to close, if unionized, must necessarily affect the judgement of its employees and interfere with their freedom of choice." This obviously has no relevance to a shut down for anti-union reasons (see R. 13).

National Labor Relations Board v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 914 (C.A. 8), does contain a dictum to the effect that an employer has an absolute right totally to abandon his business "for whatever reason he may choose, whether union animosity or anything else." However, the legal conclusions reached by the court in that case were contrary to this dictum (see R. 14–15), and the Eighth Circuit subsequently indicated the limited scope of *New Madrid*. *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261, 264–265 (C.A. 8), discussed *infra*, p. 38.

ing,[35] to shut down a plant or department and lay off the employees for a short period in order to deter unionization,[36] to allot work or temporarily discontinue a shift for like motives,[37] to transfer work from a plant where employees are engaged in union activities to one which is non-union,[38] or to subcontract work to another concern in order to discourage unionization.[39] In two cases the principle has been applied to the discontinuance of major phases of the employer's business. *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261 (C.A. 8), held that a bus company operating short-line intrastate shuttle buses and long-line interstate buses violated Sections 8(a) (1) and (3) when it unconditionally discontinued the shuttle buses and sold the equipment to a competitor because of the union activities of the drivers employed in the intrastate operation. *National Labor Relations Board* v. *Savoy Laundry, Inc.*, 327 F. 2d 370, 371 (C.A. 2), held that a laundry violated

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[35] *National Labor Relations Board* v. *Mackneish*, 272 F. 2d 184 (C.A. 6), enforcing *per curiam*, *Industrial Fabricating, Inc.*, 119 NLRB 162, 163–172; *National Labor Relations Board* v. *Tredway*, 222 F. 2d 719 (C.A. 5), enforcing *per curiam*, *Diaper Jean Manufacturing Co.*, 109 NLRB 1045, 1049, 1054, 1058–1061; *Jacob H. Klotz*, 13 NLRB 746, modified, 29 NLRB 14.

[36] See cases cited in n. 33, p. 36, *supra*. See also, *National Labor Relations Board* v. *Hill & Hill Truck Line Inc.*, 266 F. 2d 883, 886 (C.A. 5); *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. 2d 237 (C.A. 9), certiorari denied, 326 U.S. 735.

[37] *National Labor Relations Board* v. *Chicago Steel Foundry Co.*, 142 F. 2d 306, 308 (C.A. 7); *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206; *National Labor Relations Board* v. *Winona Knitting Mills*, 163 F. 2d 156, 160–161 (C.A. 8).

[38] See cases cited in n. 29, p. 34, *supra*.

[39] See cases cited in n. 30, p. 34, *supra*.

Section 8(a) (1) and (3) by discontinuing a division engaged in the wholesale laundry of shirts "in an effort to frustrate union organization." It is irrelevant (pp. 40–41, *infra*) that those cases did not involve separate plants geographically segregated from the other phases of the employer's operations. Like the present case, both precedents involved major business decisions motivated by anti-union considerations.

Neither the instant case nor any of the analogies cited involves compelling an employer to remain in business, or to operate any part of his business, against his will. By hypothesis the employer who closes only one phase of his operations voluntarily remains in business and his freedom with respect to even that part of the business is limited only by the prohibition against liquidating it as a method of avoiding collective bargaining or coercing employees in respect to their rights to organize and bargain collectively. If the employer wishes to act for any other reason, either before or after the Board's order, his freedom is unimpaired.

There is no substance to the court of appeals' suggestion that an employer who permanently discontinues part of his business "pays the price of it * * * " (VI R. 1899). Here there is ample room for argument about whether the employer actually paid a price for his decision. Since three other mills in the Deering Milliken complex manufactured print cloths similar to those produced by the Darlington mill (R. 24; 514–520, 522, 933, 935–936, 938–939, 941, 943–955), they may well have been in a position to

take over the Darlington portion of the business; indeed, several of Darlington's unfilled contracts were assumed by other Milliken mills and they went on to increase their sales to Darlington's former customers. To the extent that the reprisals at Darlington deterred the employees at other Deering Milliken mills from bargaining collectively, the employer may well have continued to enjoy lower labor costs and higher workloads than a union would have established. The complete answer to the court of appeals' suggestion, however, is that nothing in the statute or the principles developed during 30 years of its administration affords the slightest basis for the suggestion that an employer may engage in anti-union discrimination, coercion and restraint if he is willing to pay a price for it. The possible loss to a company from liquidating part of its operations may bear upon the question of motive, but once the motive has been established the cost is irrelevant.

We recognize that this case differs from the precedents upon which we rely to the extent that the Darlington mill was, in some respects, separate from other units in the Deering Milliken complex. The Darlington mill was owned by a South Carolina corporation; it was physically separate from the other plants; apparently, it received (through Deering Milliken) and filled its own orders for print goods. But these and other characteristics of separateness are inadequate to render the foregoing principles inapplicable in the face of a finding that there was a sufficient degree of common ownership *and common control of labor relations* and operations to constitute Deering

Milliken and its affiliated corporations, including Darlington, a single employer, responsible for the unfair labor practices (R. 23, 27). The critical point is that the same employer that executed the coercive closing of the Darlington mill continued in business.

In the event of the complete cessation of an employer's entire business, for whatever reason, it might conceivably be argued that at the moment of cessation there ceased to be any "employer" subject to the provisions of the National Labor Relations Act who could commit an unfair labor practice in violation of Section 8 or be subjected to a remedial order under Section 10. No doubt it would be answered that the liquidated concern remained responsible for the unfair labor practices committeed while it was in business. That issue need not be resolved here because the Board's finding that Darlington and the affiliated corporations in the Deering Milliken complex constituted a single employer eliminates any basis for the contention that the employer ceased to exist upon the liquidation of the Darlington mill. The Deering Milliken complex continued in business. It was named a respondent and an order was directed against it. Similarly, in the event of a total and permanent cessation of an employer's entire business it might be argued that there were no "employees" to be thereafter deprived of the rights of self-organization and collective bargaining because all employment had ceased altogether. Here the Deering Milliken complex continued to employ workers in other mills, who might wish to bargain collectively but who would surely be intimidated by the living proof of Deering

Milliken's determination to close a mill if necessary to prevent bargaining with a union. No one who reads the reprint of the article which Roger Milliken circulated describing the three Milliken mills closed upon unionization can doubt his intent to spread the evidence of his determination to the communities in which other Milliken mills were located, thus coercing and restraining those who did continue to be employees of the Milliken complex.

The court of appeals argued that, since "the fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee" (VI R. 1899), the Act does not apply to the total and permanent dissolution of that relationship, whatever the reason. Even if we assume *arguendo* the court's definition of the scope of the Act,[*] this case satisfies it.

Since the 27 mills in the Deering Milliken complex were all a single employer for the purposes of the Act and all but the Darlington mill were kept in operation, there remained a continuing employment relationship to be affected, then and thereafter, by the coercive anti-union closing of the Darlington mill. The employees remaining in that relationship could enjoy full

[*] The Board's holding (R. 9–18) that an employer who abandons his whole business as reprisal for the union activities of his employees violates Sections 8(a) (1) and (3) makes it plain that the Board would not accept the court of appeals' reasoning, but we find it unnecessary to argue the point since the Board's other findings make it plain that this employer did not abandon its entire business.

freedom of choice, unintimidated by their employer's reprisals at Darlington, only if the Board awarded an effective remedy for the discrimination and interference, coercion and restraint. By the court of appeals' own definition of the scope of the Act, therefore, the closing of the Darlington mill was within its province.

II. THE BOARD HAS POWER TO GRANT EFFECTIVE REMEDIES FOR THE UNFAIR CLOSING OF ONE OF THE SEVERAL UNITS OF AN EMPLOYER'S BUSINESS, INCLUDING REINSTATEMENT TO EMPLOYMENT OR PREFERENCE IN HIRING IN THE REMAINING OPERATIONS AND REIMBURSEMENT FOR LOST PAY

The court of appeals suggested, as one of the reasons for holding that the employer's closing of the Darlington Mill did not violate Sections 8(a) (1) and (3), that there would be difficulty in framing a valid remedial order (VI R. 1899). Whatever may be the case where the employer's entire business is liquidated, there is no serious obstacle to framing a fair and effective remedy where the same employer continues to operate other major units of the business.

Section 10(c) empowers the Board to order an employer who has been found guilty of an unfair labor practice—

> to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

The Board is to draw upon its experience with the practical workings of industrial relations and must take "fair account, in a civilized legal system, of every socially desirable factor in the final judgment."

Phelps Dodge Corp. v. *National Labor Relations Board,* 313 U.S. 177, 198.

Restoration of the *status quo ante* the unfair labor practice, insofar as just and practicable, plus compensation of the employees' losses, will ordinarily tend best to effectuate the policies of the Act. It deprives the employer of the fruits of wrongdoing and thus discourages repetition. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 705. It also secures employees' freedom in the exercise of their statutory rights, by assuring them that the law, despite inevitable delays in enforcement, will put them as nearly as possible in the same situation as if the law had been obeyed.

Where part of an employer's business has been abandoned in violation of Sections 8(a) (1) and (3) as reprisal for electing to bargain collectively, exact restoration of the *status quo ante* would require an order to resume the abandoned portions of the business. In some instances such orders may be practicable. *E.g., National Labor Relations Board* v. *Preston Feed Corp.,* 309 F. 2d 346, 351–352 (C.A. 4) (resumption of trucking operations); cf. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* No. 14, this Term (resumption of maintenance operations unilaterally abandoned in violation of duty to bargain). In other cases an order requiring resumption of the discontinued operation may be utterly impracticable or so burdensome to the employer as to be substantially unjust. That might be true, for example, where a plant was liquidated, the machinery and real estate were sold, and relations terminated

with customers and suppliers. In most cases the Board would have to weigh the advantages and disadvantages of full restoration of the *status quo* against the merits and demerits of less stringent measures.

In the present case the Board ordered restoration of the *status quo* to the fullest extent possible without reopening the Darlington mill and unduly prejudicing other innocent employees. It directed Deering Milliken, the employer, to rehire the Darlington employees at other mills, paying the expenses of their transportation, or, where enough work was not available to give them all immediate employment, to put them on a preferential list for hiring. This was the same course Deering Milliken followed in dealing with managerial personnel at Darlington who lost their jobs as a result of the closing (VI R. 1913–1914). The end result was doubtless an accommodation of conflicting considerations. Resumption of the Darlington operation would have required respondents to purchase a new plant and equipment and to hire a new supervisory staff. Immediate placement at other mills might have necessitated the discharge of innocent third parties employed at these locations. Thus, the Board had to balance the need for restoring the employees to the positions they would have occupied but for the unfair labor practice against the dislocation of the employer's business which would have resulted from that remedy. See *Williams Motor Co.* v. *National Labor Relations Board,* 128 F. 2d 960, 965 (C.A. 8). The accommodation made by the Board manifestly tends to restore the *status quo* and to cancel some of the advantage respondents sought to derive

from the unfair labor practices, while also taking account of the risk of injustice to the employer and its other employees. It is analogous to the remedies granted in similar situations."[41]

The provision of the order requiring Deering Milliken to bargain with the Union about implementation of the preferential hiring and relocation system was also an appropriate step towards recreating the conditions that would have existed if respondents had complied with the Act. Since the Union had proven its majority status in the election which provoked respondents into closing the Darlington plant, and, since any loss of such status thereafter was attributable to the unlawful decision and announcement to close the plant, the Union was entitled to represent the plant's employees in all matters pertaining to their conditions of employment. See *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16.

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[41] See *National Labor Relations Board* v. *Missouri Transit Co.*, 250 F. 2d 261, 263–265 (C.A. 8); *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 482 (C.A. 3); *National Labor Relations Board* v. *Mackneish*, 272 F. 2d 184 (C.A. 6), enforcing *per curiam*, *Industrial Fabricating, Inc.*, 119 NLRB 162, 172–173; *National Labor Relations Board* v. *Gerity Whitaker Co.*, 137 F. 2d 198 (C.A. 6), certiorari denied, 318 U.S. 763, enforcing as to this point, 33 NLRB 393, 420; *National Labor Relations Board* v. *Schieber*, 116 F. 2d 281 (C.A. 8), enforcing as to this point, 26 NLRB 937, 966–967; *Philadelphia Dress Joint Board, International Ladies' Garment Workers' Union, AFL–CIO* v. *National Labor Relations Board*, 305 F. 2d 825 (C.A. 3), enforcing *per curiam*, *Sidele Fashions, Inc.*, 133 NLRB 547, 554–556; *National Labor Relations Board* v. *Lexington Electric Products Co.*, 283 F. 2d 54, 56–57 (C.A. 3), certiorari denied *sub nom. Local 3, International Brotherhood of Electrical Workers, AFL–CIO* v. *National Labor Relations Board*, 365 U.S. 845.

Section 10(c) also gives the Board express power to award back pay to employees who have lost their jobs as the result of an unfair shut-down of one unit of an employer's business. The remedy goes part way to compensate the employees, but it is not unfair to the employer. If the award seems large, it is large because of the scale on which injury was inflicted. Nor is it an objection that the respondents had an arguable legal defense—accepted by a majority of the court of appeals—to the unfair labor practice charge. First, the same can be said of every litigated case involving back-pay awards. In each instance, the employer asserts some defense which is ultimately rejected on judicial review of the Board's order; yet the defense does not free him of the back-pay obligation.[42] Moreover, the present case involves a particularly egregious course of antiunion activity. The unfair labor practice charge is not the product of an isolated impropriety or good-faith omission by an employer. If, in fact, respondents constitute a single employer, the conduct complained of amounted to a flagrant violation of Sections 8(a)(1) and (3) of this Act. Finally, in the present situation the Board was unable to restore the former Darlington employees fully to their prior status without requiring the plant to be reopened. Since it could provide only a partial reinstatement remedy—by requiring job offers or preferential listing at other

[42] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197–198; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344.

plants—it could balance this deficiency by granting a full back-pay award. Hence it was entirely appropriate for the Board, in giving "coordinated effect to the policies of the Act," *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348, to strike the balance on back-pay in favor of the former Darlington employees and issue an award which would make them whole up to the time when they could find substantially equivalent employment, or were placed on a preferential hiring list at the other Deering Milliken plants.

Whether the same remedies would be suitable in another case is a question that can be safely left to the future. Nor do we seek to anticipate questions which may be raised, on remand, in the court of appeals. The important point, for present purposes, is that the Board has ample power to frame fair and practicable remedies for the unfair labor practice of shutting down even a more-or-less self-contained unit of the employer's business in reprisal for union activities. The Board has devised similar remedies in analogous cases.[43] Questions concerning the Board's remedial powers, therefore, furnish no ground for doubt whether such a closing is an unfair labor practice.[44]

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[43] See cases cited in n. 41, p. 46, *supra*.

[44] There is no merit to the Union's contention that the Board's order should have run against Roger Milliken individually (Petition, No. 37, pp. 19–21). Since the order is directed to the various corporations, and "their officers, agents, successors, and assigns" (R. 30), it clearly covers Roger Milliken in his capacity as an officer or agent of the corporations.

CONCLUSION

For the reasons stated, the judgments denying enforcement of the Board's order should be reversed, and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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SEPTEMBER 1964.

The only charge made against Roger Milliken was in his capacity as president of Darlington (R. 1241, Tr. 10), and the charge referred to "employer" in the singular. Nor can it be argued that he was there named, like Deering Milliken & Co., as a separate component of the "single employer." Nowhere in this charge was it suggested that Roger Milliken individually was equivalent to one of the Deering Milliken corporate plants or a separate arm of the single organization. In these circumstances the Board properly concluded that timely notice had not been given to Roger Milliken that an attempt was being made to subject him to personal liability for the unfair labor practices committed at the Darlington mill (R. 29–30).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

* * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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